

Wrongly Accused: Is Race a Factor in Convicting the Innocent?

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I. INTRODUCTION

I made an unusual choice in deciding to write this informal essay about race and innocence. The choice is unusual because my primary purpose in doing so is to flaunt my ignorance on the subject—to reach out to readers for help in clarifying my confusion. I am not, however, overly embarrassed by my ignorance because the subject is one on which no one yet knows very much. The main point of my essay indeed is simply to encourage more work in this area because much more is needed. My goal, after quickly summarizing in this *Introduction* just how little we know, is to make a plausible, albeit speculative, case for the proposition that race likely is a serious risk factor for the innocent suffering conviction—a plausible enough case to merit extended empirical and theoretical work in this area.

So let's take stock of what little we do know.

First, Barry Scheck's Innocence Project, for those who don't know, has crafted an on-line set of materials to be used in seminars and larger classes on innocence. I have used these materials as part of an innocence seminar and can testify that they are thorough and up-to-date.¹ If you click on the topic, "Race and

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¹ See National TWEN Course, *Wrongful Convictions, Causes and Remedies*, available at <http://www.lawschool.westlaw.com/manage/HomePage.asp?NavChoice=mycourse&task=coursehomepage&courseid=9024> (password available from Professor Barry Scheck, Yeshiva Benjamin Cardozo School of Law) [hereinafter *Causes and Remedies*]; Andrew E. Taslitz, Syllabus: Advanced Evidence: Wrongful Convictions Seminar (Spring 2004) (on file with author).

Innocence,” however, you will find largely general materials—materials on, for example:

- *Batson* & jury selection;
- Selective prosecution and race discrimination;
- Ethics and judicial tolerance of racial bias;
- Felony disenfranchisement; and
- Sheri Lynn Johnson’s 1988 piece on the role of the unconscious in criminal law.²

But you will find no current materials whatsoever specifically on innocence and race.

Second, Sam Gross and his colleagues have helped this situation with the recent publication of their analysis of exonerations through 2003. Concerning race, they reached two major conclusions: (1) that race played an important role in eyewitness misidentifications in rape cases and (2) that, for juveniles exonerated, over 90% were blacks or Hispanics—a disparity that could be due to chance, that might partly involve eyewitness misidentification in juvenile rape cases, but that also might stem from more coercive police interrogations as 85% of juvenile exonorees who falsely confessed were African-American. Gross’s goal was, however, more about describing the data than detailing the social-psychological processes at work.³

Third, Karen Parker and associates, in an essay in a 2001 innocence anthology, drew on data from the only four major studies she could then find on race and innocence. Each of these studies, she concluded, revealed that a disproportionate percentage of wrongful convictions involved racial minorities—for example, one study found that 57% of exonorees were black. Parker and her colleagues postulated two sorts of explanations for this disparity: structural explanations, in which power imbalances in society more generally result in disparate impact of the criminal justice system generally on racial minorities, of which mistaken convictions are but one manifestation, and psychological explanations of individual error.⁴

For purposes of this informal essay, I am more interested in individual psychology as a source of error because it can lend itself more readily to short-run improvements via the legal system rather than awaiting broader, more fundamental changes in society. Parker identified racism, racial stereotyping, cross-racial

² See *Causes and Remedies*, *supra* note 1; *Batson v. United States*, 476 U.S. 79 (1986); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

³ See Samuel Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545–51 (2005).

⁴ See Karen F. Parker, Mari A. Dewees, & Michael L. Radelet, *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 114, 114–28 (Sandra D. Westervelt & John A. Humphrey eds., 2001).

identification errors, and minorities being easy targets often unable to have the resources to fight back effectively as likely sources of psychological error. Nevertheless, Parker did not delineate with any precision how these psychological processes worked or parse out how they might play out at different stages of the investigatory process—for example, in interrogations, reliance on informants, lab analyses, prosecutorial argument, perjury, and so on.⁵

Moreover, though none of these few studies *prove* anything about causation, they do raise eyebrows—the suspicion that something is even more amiss than usual when race comes into play. For the past three years I have participated as a member of the American Bar Association's (ABA) Ad Hoc Committee on Innocence and the Integrity of the Criminal Justice System—chaired by American Association of Law Schools (AALS) Section members Myrna Raeder and Paul Giannelli—and as one of the two new co-reporters for the Constitution Project's Death Penalty Initiative—roles originally played by Bob Mosteller and Susan Bandes. Those experiences further raised the eyebrows of us all, yet there was too little evidence for either the ABA or the Constitution Project to say anything definitive about the role of race in wrongful convictions or what to do about it. The ABA simply counseled caution and further attention.⁶

In only one area has the science proceeded far enough to support some reasonably confident conclusions—though more work still needs to be done—and that is in the area of cross-racial misidentification.⁷

Because I am more interested in what we don't know than in what we do, however, I'm only going to say a little bit about this area. But it is worth saying a little bit because it raises some hints about where the research needs to go in other areas of police investigation and plays a part in suggesting a working hypothesis about the race-innocence connection that I will elaborate upon shortly.

⁵ See *id.* at 114–28. See generally *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, 2006 A.B.A. CRIM. JUST. SEC. REP. (tracing the contributors to wrongful convictions that arise at every stage of the criminal justice system) [hereinafter *Ensuring Integrity*].

⁶ See generally *Ensuring Integrity*, *supra* note 5; THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 35–39 (2005) (taking the position that the death penalty is imposed in a discriminatory manner but recommending simple data collection and ensuring involvement of racial minorities in every step of the decision-making process, while acknowledging that “a single recommendation that sets forth a single remedy to this complex problem is not in view” and making no recommendation whatsoever concerning whether race is a cause of wrongful convictions (as opposed to wrongful *sentences*) in death penalty cases).

⁷ See ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 788–96 (2d ed. 2003) (summarizing factors affecting eyewitness accuracy, including especially the problem of cross-racial identification error).

II. LESSONS FROM EYEWITNESS RESEARCH

Among the findings of the eyewitness research have been these:

- *Cross-racial* identification procedures are more likely to be in error than *intra-racial* ones, and this effect is more exaggerated where the witnesses are white—especially concerning the risk of false alarms, that is, of fingering the innocent.
- The likely cause of this process, according to one influential school of thought, is that for *intra-racial* identifications, witnesses focus on the unique facial configuration details, while for perceived out-group faces, witnesses focus primarily on group categorization cues, that is, features perceived to be shared by group members.
- Verbal labels can worsen this process, e.g., the description of an assailant as having “dark, frizzy hair and looks like a boxer” leads to the sense when seeing someone with such hair and build that “I’ve seen that face before.”
- These processes are unconscious and automatic.
- Research with ambiguous race faces shows that changing just one facial feature to a stereotypical racial marker triggers the racial categorization identification process rather than the more accurate *intra-racial* configural detail process.
- Some research suggests that there are some good post-dictive ways—that is, after-the-fact ways—to say with a significant measure of confidence how likely it is that an eyewitness identification is accurate. Yet in other-race situations, these post-dictors are useless so that there is no way to make an educated after-the-fact accuracy estimate: race overwhelms other factors.⁸

These findings suggest that something about race leads other-race observers to pay attention only to certain features of the observed, ignoring or downplaying others.

⁸ See Christian A. Meissner & John Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL’Y & L. 3, 21–24 (2001) (analyzing nature of the effect and its greater impact on white witnesses); Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 PSYCHOL. PUB. POL’Y & L. 36, 77–88 (2001) (explaining configural in-race versus categorization of out-race effects; similar frizzy hair example); Otto H. MacLin & Roy S. Malpass, *Racial Categorization of Faces: The Ambiguous Race Face Effect*, 7 PSYCHOL. PUB. POL’Y & L. 98, 112–13 (2001) (suggesting that featural and other factors which trigger a witnesses’ placement of a suspect into the “other-race” category switch-on stereotyping rather than individualizing processes of facial recognition); Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed in the Cross-Race Situation?*, 7 PSYCHOL. PUB. POL’Y & L. 153, 166–67 (2001) (describing how the other-race effect can render otherwise helpful post-dictors of eyewitness accuracy in an individual case useless).

It is therefore a process of selective inattention and weight that leads to a confidently-held assumption of guilt that resists further investigation or contrary evidence. This unconscious, automatic process has an extraordinarily powerful grip on the human mind, especially with a white observer, who may have little regret about the risk of error because of a working assumption about minority, especially black, guilt. All this can happen despite the white observer's conscious rejection of racial stereotyping.⁹

My argument is that these psychological phenomena apply more broadly and with implications at every stage of the investigation and guilt-determination process. Specifically, racial features trigger an unconscious process of stereotyping and selective inattention. This process includes assumptions about racial minority—paradigmatically, black—character and behavior, blacks being seen as violent and unstable. Other research further demonstrates that blacks alter their behavior in defensive response to these unwarranted suspicions in ways that increase those suspicions further, building pressure toward more aggressive policing tactics. Those tactics themselves, however, generate flawed confirming evidence—such as false confessions or perjured informants' tips—while psychically hiding discomforting evidence from the conscious mind of the police. But these same stereotypical processes are at work with fact-finders, who now readily believe the most flawed of evidence, resulting in a mistaken conviction.¹⁰

For this theory to make some sense, I need to give a feel for how selective racial attention, racial character-based stereotypes, and early theory formation work, drawing both on empirical work and helpful anecdotes. I then want to illustrate how such a process might work in suspect interrogation, with some

⁹ See sources cited *supra* note 8; cf. CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL-PSYCHOLOGICAL SYSTEM* 203–09 (2005) (discussing the “empathic divide” between blacks and whites that makes it harder for the latter to have compassion for, or equal concern about the welfare of, the former, no matter how consciously “enlightened” many of the whites may be).

¹⁰ For an analogous cognitive theory explaining unconscious racial biases by even the most egalitarian-minded persons through processes of situational ambiguity, self-fulfilling prophecies, and failures of imagination, see LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* (2006). For an overview of processes of selective racial inattention and excessive racial weight-attribution that more specifically focuses on the implications for courtroom practice and pre-trial investigation and preparation in criminal cases, see JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997). On minority behavioral-defensiveness and resulting enhancement of police suspicion, see Malcolm D. Holmes, *Minority Threat and Police Brutality: Determinants of Civil Right Complaints in U.S. Municipalities*, 38 *CRIMINOLOGY* 343, 350 (2000) (“Minority citizens distrust the police, whom they view as threatening symbols of oppression. They may be more antagonistic to the police, which increases the severity of both formal and informal police sanctions against them.”). On the nature of human self-deception generally and the psychological processes by which it works, see Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 *HARV. J.L. & GENDER* 381, 388–403, 413–23 (2005). I am focusing here on African-Americans as an important example sufficient to make my point in this short essay, but I do not thereby mean to suggest that other racial and ethnic groups do not suffer an enhanced risk of the innocent being convicted. To the contrary, I offer African-Americans as the paradigm group whose fate may be reflective of a broader problem.

speculations on the cumulating of racial disadvantage further down the criminal justice pipeline.

III. RACIAL STIGMA AND BLACK CHARACTER

There is ample data showing that whites generally believe that African-Americans are more violent than whites. Sheri Lynn Johnson has persuasively argued that the evidence is in fact sufficient to shed light on racial disparities in the imposition of the death penalty, particularly in white-on-black crime. White jurors more readily believe that blacks will continue to be dangerous in the future and are more likely to ignore mitigating evidence, treating instances of the defendant's bad character as more representative of the "true character" of people of "his kind" than instances of good behavior.¹¹ White jurors also engage in what sometimes has been called the "ultimate [fundamental] attribution error." The fundamental attribution error is the human tendency to attribute behavior more to individual character than to a good or bad set of circumstances. Whites make this error with a vengeance when evaluating blacks, seeing all bad behavior by blacks as stemming from some fundamental flaw in their nature, from an irredeemably unworthy core rather than from an unfortunate situation.¹² Furthermore, argues Johnson, some whites are "regressive racists" able to accept egalitarian norms, except when their anger is aroused by racial insult, such as a black assault upon a white victim—accordingly strengthening racial stereotypes, and helping to explain the greater likelihood of the death penalty in such black offender/white victim situations.¹³

Recent work in the area of sentencing supports such character-based notions. Many investigators have found no racial bias in judicial sentencing practices.¹⁴ But one new study found that there was a strong correlation between harsher

¹¹ See Sheri Lynn Johnson, *Race and Capital Punishment*, in *BEYOND REPAIR? AMERICA'S DEATH PENALTY* 11, 135–39 (Stephen P. Garvey ed., 2003).

¹² See HANEY, *supra* note 9, at 203–09; T. Petigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, in *INTERGROUP RELATIONS: ESSENTIAL READINGS* 162–73 (Michael Hogg & Dominic Abrams eds., 2001) (coining the term "ultimate attribution error"). See generally LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1991) (the seminal work on the fundamental attribution error). Johnson did not herself rely on the "ultimate attribution error" terminology or research, but her work is consistent with, and supported by, ultimate attributionism.

¹³ See Johnson, *supra* note 11, at 138.

¹⁴ See, e.g., MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 79 (1995) ("From every available data source . . . the evidence seems clear that the main reason that black incarceration rates are substantially higher than those for whites is that black crime rates for imprisonable crimes are substantially higher than those for whites."). A better read of the modern data is that pure race-based bias is geographically dispersed and modest but that effects are much more substantial when the interaction of race with other factors like age, gender, and class is examined. See generally THE SENTENCING PROJECT, *RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE* (2003); *Justice Kennedy Commission Report*, 2004 A.B.A. JUST. KENNEDY COMMISSION REP.

sentences and stereotypically “Afro-centric features,” suggesting that even judges read such features as signs of basic character flaws.¹⁵

Black male youth, it turns out, suffer from a heightened and specialized form of these character assessments. Young black males entering the juvenile justice system are more likely to be institutionalized because authorities assume that they cannot get adequate parental support. These same authorities are more likely to define black families as uncooperative. Juvenile justice decision-makers also favor black detention because they are more likely to attribute black youths’ behavior to dangerousness, and white youths’ law-breaking to situational pressures. Probation officers are more likely to write reports describing young black males’ problems as due to deep-seated character traits than to write similar reports about whites, leading to recommendations of harsher black punishment. Re-offenders are also treated more harshly because they were institutionalized, yet that most extreme form of treatment seemingly failed to achieve rehabilitation. All these observations remain true even when controlling for the relative severity of black-white juvenile crime, argue Michael Brown and associates in their book, *Whitewashing Race*.¹⁶ These effects cumulate the further a black male enters into the juvenile system. Thus, as of the late 1990s, black youth were only 15% of the under 18 population, but represented:

- 26% of juvenile arrests;
- 44% of juveniles referred to court but who were detained in custody;
- 40% of juveniles in residential placement;
- 46% of juveniles waived to adult criminal court; and
- 58% of youth admitted to state adult prisons.¹⁷

Police suffer from these same skewed character assessments. Police are more likely to focus their surveillance on black neighborhoods because they see those as more likely locations for crime. Police are especially suspicious of young black males, thus being more likely to stop and question them. Such frequent stops are yet another example of “micro-aggressions”—the accumulation of many perceived small racial insults. The effect of these micro-aggressions, especially on young men, is to harbor resentment toward the police, thus often reacting with hostility when stopped. But police interpret this hostility as indicative of guilt, thus confirming their preconceptions and leading them to heighten the aggressiveness

¹⁵ See generally William T. Pizzi, Irene V. Blair, & Charles M. Judd, *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327 (2005).

¹⁶ See MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 140–47 (2003) (summarizing the relevant research on the fate of young black males in the juvenile justice system and the causes of the resulting racial disparities).

¹⁷ See *id.* at 140–41.

of their surveillance and investigation. Black male hostility becomes understood as a threat and insubordination to hide illegality.¹⁸

One black police officer with a law degree, Jackie Campbell, recently wrote about similar experiences patrolling with white officers. When first patrolling, Officer Campbell noticed that when black motorists were stopped for even simple traffic violations, officers expected, as did the motorists, that the driver would immediately raise his hands above his head when approached by the officers. Campbell was told that this was routine practice in so-called “high narcotic areas,” though it never happened in white neighborhoods. Campbell also found that officers were more ready to disbelieve black complainants than white ones, too readily assuming that purported black victims were, for example, trying to cover up a drug deal gone bad—assumptions made without further investigation. When Campbell protested, he was severely punished, finding himself ostracized and often working dangerous assignments without backup. The pressure on black officers to buy into these same racial stereotypes was thus enormous.¹⁹

Susan Bandes, in a recent essay in a symposium on loyalty and criminal justice, writes of the police tendency to show loyalty to an idea—to early theories of who done it, why, and how. Loyalty to certain theories of the case may be perceived as loyalty to the police as a group. This is equally true of prosecutors, argues Bandes. Even pursuing alternative theories may thus be viewed as an expression of group *disloyalty*—of a rejection of a fundamental worldview that ties the group together.²⁰

Social economist Glenn Loury sees this form of cognitive bias as especially powerful in connection with race. Police will not even experiment with theories contradicting their racial presumptions because they are at least subconsciously so

¹⁸ See, e.g., Douglas E. Thompson, *The Presence and Effect of Micro/Macro-aggressions and Petit Apartheid*, in PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM: THE DARK FIGURE OF RACISM 21 (Draggan Milovanovic & Kathryn K. Russell eds., 2001) [hereinafter DARK FIGURE] (micro-aggressions and the police); Jeanette Covington, *Round Up The Usual Suspects: Racial Profiling and the War on Drugs*, in DARK FIGURE, *supra*, at 27 (racial stereotyping and stops-and-frisks); Sandra Bass, *Out of Place: Petit Apartheid and the Police*, in DARK FIGURE, *supra*, at 43. (racial sweeps, gangs, and quality of life policing); CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 175–89 (2003) (describing unconscious police racial stereotyping of young black males as dangerous and explaining its connection to police use of excessive force); Holmes, *supra* note 10 (identifying black male hostility to the police as a source of police suspicion and aggression).

¹⁹ See Jackie Campbell, *Walking the Beat Alone: An African American Police Officer's Perspective on Petit Apartheid*, in DARK FIGURE, *supra* note 18, at 15.

²⁰ See generally Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006); SCOTT TUROW, ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY 34 (2003) (noting that “police often become prisoners of their own initial hunches”); STEVEN M. PASSAMANECK, POLICE ETHICS AND THE JEWISH TRADITION 33–75 (2003) (explaining the dangers of police loyalty to the police as a group and offering a proposed ethic for combating these dangers).

convinced of their rightness that pursuing other options is a waste of time.²¹ The officer “*doesn’t learn*,” says Loury, “*because he doesn’t think that learning will pay*.”²² Loury posits two hypothetical situations, Situation 1 in which each member of a racial sub-group will offend against the law on one out of every ten occasions, and Situation 2, in which ninety percent of the group never offend but ten percent always do.²³ Situation 2, says Loury, does not justify profiling because so many innocent persons will be harassed, while Situation 1 might justify profiling because even if the person stopped is not then offending, he is still guilty of past crimes and will commit future ones, so we need not cry for the imposition imposed upon him.²⁴ But, maintains Loury, the real world for blacks is in fact more like Situation 2—in which the vast majority of persons are law-abiders—but police, at least subconsciously, view the world as Situation 1, a world in which all blacks are guilty of something.²⁵ That assumption will not be challenged, and the emphasis of surveillance on a black population that is in fact largely innocent but is nevertheless perceived as largely guilty will, therefore, necessarily lead to more errors of wrongly believed guilt being visited upon blacks than upon whites. Police inability or refusal adequately to understand certain black cultures, languages, and demeanor can further exacerbate miscommunication and false perceptions of guilt. For Loury, this is but one manifestation of the ills of racial stigma—the perception of black bodies as cues of dishonor, exclusion, and unworthiness—the assigning of blacks to a social netherworld.²⁶

²¹ See GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 26–64 (2002).

²² *Id.* at 64 (emphasis in original).

²³ *Id.* at 61.

²⁴ *Id.*

²⁵ *Id.* at 63–64.

²⁶ See *id.* at 61–65 (Situations 1 and 2), 65–91 (racial stigma and dishonor and its cognitive, cultural, and material consequences). Loury did not expressly address the role of linguistic differences, but his analysis is consistent with such a role. See generally THOMAS KOCHMAN, *BLACK AND WHITE STYLES IN CONFLICT* (1981) (offering an extended argument that on-average differences in black and white communication styles and the meaning each race ascribes to them account for much inter-racial miscommunication and suspicion). Law professor and criminologist Kathryn Russell-Brown similarly notes:

The fact that Blackness is perceived as a threat to Whites as a group and to police officers as a group has paved the way for policing strategies that target and sanction potential minority offenders. In turn, these strategies support police practices that treat Blacks as representative of society’s deviance. This creates a dynamic relationship in which many Blacks are suspicious and fearful of the police and many Whites and law enforcement officials are fearful of African Americans. Malcolm Holmes describes the resulting relationship as a “climate of mutual threat.”

KATHERYN RUSSELL-BROWN, *UNDERGROUND CODES: RACE, CRIME, AND RELATED FIRES* 67 (2004) (citation omitted).

Now, finally with a little background into the dynamics of police interrogation, we can see how the dynamics of race can raise the risk of a false or misunderstood confession.

IV. THE DYNAMICS OF INTERROGATION

Social psychologists widely agree that many of the interrogation techniques for judging suspect credibility taught to police officers under the rubric of science are anything but. Instead, they are based on facially implausible psychological assumptions not only not validated by empirical evidence but actually *contradicted* by empirical evidence. The resulting police officer judgments made about an interrogatee's credibility are thus based on little more than the investigator's subjective judgments, hunches, and a series of after-the-fact observations designed to confirm preconceptions, for example, concerning the meaning of eye movement during interrogation.²⁷ Some research also suggests that the more powerless party in a situation—a black youth isolated in an interrogation room with multiple detectives clearly fitting that relatively powerless bill—is likely to adopt a style of speech perceived by observers as less credible, a phenomenon that may again feed into uninformed officers' preconceptions.²⁸

A separate line of research shows that most people are generally notoriously bad at judging other persons' credibility based on their demeanor. This same research shows, however, that those with law enforcement training and experience are more likely than those without it to see deception, to perceive guilt, and to have a high level of confidence in these judgments *yet are no more likely to be right in fact*.²⁹ This is likely so, the researchers maintain, because prior experience, presumed base rates of behavior, stereotyping, and a system of rewards for gathering incriminating rather than exculpatory evidence encourage this view. Police may thus readily interpret nervousness during interrogation—a natural

²⁷ See Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37, 79 (G. Daniel Lassiter ed., 2004) [hereinafter INTERROGATIONS].

²⁸ See, e.g., LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 60–61 (2005) (discussing the likelihood that less well educated suspects or those of lower socioeconomic status are more likely to adopt “powerless” speaking styles during police interrogation); ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 67–80 (1999) (discussing the reduced credibility of speakers of “powerless language” and the social-psychological factors, including race, that can promote either the actual or perceived presence of such language). See generally Steven A. Drizin & Beth A. Colgan, *Tales from the Juvenile Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, *supra* note 27, at 127–58 (discussing special vulnerability of juveniles to false confessions); JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 60–77 (2d ed. 2005) (summarizing powerless speaking styles research).

²⁹ See, Christian A. Meissner & Saul M. Kassir, “You’re Guilty, So Just Confess!”: Cognitive and Behavioral Confirmation Biases in the Interrogation Room, in INTERROGATIONS, *supra* note 27, at 85, 90–93.

reaction by anyone in that situation—as in fact only typical of the guilty. Stereotypes have more clout when cognitive resources are limited, such as by time or social pressure, and where a theory is held in great confidence; the latter also leads to neglecting further evidence-gathering or to heightened attention to confirmatory evidence and diminished attention to contradicting evidence.³⁰

When investigators expect suspect guilt, however, they use more investigative techniques, try harder, exert more pressure and, as a result, lead innocent suspects most of all to behave defensively. But that defensiveness makes them appear more guilty to observers. Indeed, in lab experiments pairing the most guilt-presumptive interrogators with the truly innocent, the harshest interrogation techniques result, in turn causing the greatest intensification of the presumption of guilt.³¹ Researchers maintain that these lab results likely *underestimate* real-world risks because detectives:

- are trained to have confidence in their judgments;
- are trained to use psychological interrogation techniques effectively;
- are motivated by career aspiration to solve cases; and
- typically pressure suspects over the course of hours, not, as in the lab, just minutes of interrogation.³²

The innocent may also readily waive *Miranda*, believing that their innocence will set them free and not realizing that what they see as exculpatory statements may be viewed by others as inculpatory. As the time for interrogation builds, and as a suspect is increasingly confronted with manufactured or biased evidence against him—two very typical interrogation techniques—the risk of falsely confessing to escape the isolation and pressure rises dramatically; this is especially true of juveniles.³³

Now when we add race to the mix, the picture becomes clearer. Officers start with a presumption of the guilt of a young black male based upon one-sided and

³⁰ See *id.* at 93–94.

³¹ See *id.* at 96.

³² See *id.*

³³ See *id.* at 98 (noting that the innocent are more likely than the guilty—“by a striking margin of 81 to 36 percent”—to sign a *Miranda* waiver form); WELSH WHITE, *MIRANDA’S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 200–15 (2001) (describing factors contributing to false confessions, especially youth and extended interrogation time); Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 200 (2003) (explaining that where investigators expected a suspect’s guilt, they interpreted even innocent suspects’ plausible denials of guilt “as proof of a guilty person’s resistance—and redoubled their efforts to elicit a confession,” often resulting in *the most pressure to confess being exerted on the actually innocent*); Meissner & Kassin, *supra* note 29, at 98 (“Naively believing in the transparency and power of their own innocence to set them free, most of the innocent participants waived their rights even in the hostile detective condition, where the risk of interrogation was apparent.”).

limited circumstantial evidence. The kid reacts with hostility and defensiveness. These reactions, combined with his powerless speech patterns, lead police to believe he is lying. They close off alternative theories, heightening the pressure on the kid about whose guilt they are now convinced. They make real evidence sound more inculpatory than it is, they deceive him into believing there is still more inculpatory evidence against him, they appeal to his self-interest, and they hammer away at him for hours. Young, isolated, cut off from family and friends, fearful, and rightly seeing no way out, he confesses. Falsely.³⁴

Should the youth take the stand at a suppression hearing, the judge, drawing on the same racially-stigmatizing images of black youth, won't believe him. The case goes to trial, and the jury likely sees a film just of his confession. But even if they see a video of the entire interrogation, they will see a camera focused on only the suspect, not the police, a camera angle shown in laboratory studies to enhance the perceived likelihood of guilt. Moreover, the same defensiveness and linguistic barriers that made the kid seem to be a liar to the police prod the jury toward a similar conclusion. And the same stereotypes of black criminality and duplicity again favor jurors accepting the truthfulness of the confession rather than of its retraction.³⁵

³⁴ On the risk of the innocent confessing, see WHITE, *supra* note 33, at 200–15. Lu-in Wang has recently made a similar argument about how an officers' suspicion of black males and presumption of their guilt can become a "self-fulfilling prophecy" in which increasingly aggressive tactics spur suspect behaviors perceived as confirming guilt. See WANG, *supra* note 10, at 75–81. Wang used interrogations as an example of a broader cognitive process of unconscious racial "discrimination by default" in a wide range of social interactions, from the provision of health care to media coverage of the news, rather than focusing specifically on the problem of race and innocence. Consequently, Wang only tangentially addressed how racially-biased interrogation practices can be part of a cumulative, multi-stage process of racial disadvantage throughout the criminal justice system that compounds the risks of error as a suspect moves from one phase of prosecution to the next. Nor did she address the contributing factor of "powerless" languages or why real-world racial interrogation bias is likely worse than that in the courtroom. She did, however, discuss jury impact (though not judicial impact, such as motions to suppress) and used the language of "attribution error" but with less emphasis on the idea of skin color as a badge of personal character. Ultimately, these are differences of purpose, emphasis, and detail but converge on the same conclusion: there is strong reason to believe that a suspect's race increases the likelihood of obtaining a false confession. Cf. Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 29, 138 (2000) (arguing that police habit of approaching black citizens with undue suspicion fosters blacks' withholding from police respect and deference, triggering harsh responsive police tactics, construed by citizens as evidence of racial discrimination, thus further energizing a feedback loop of mutual suspicion).

³⁵ See G. Daniel Lassiter & Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence*, in INTERROGATIONS, *supra* note 27, at 197, 201–02 ("[O]bservers of a videotaped confession recorded with the camera focused on the suspect, compared with the same confession recorded from a different camera perspective, might be more likely to judge the confession as voluntary (i.e., attributable to the suspect [rather than the police]). Considerable empirical data now exist indicating that this is not simply a possibility; it is a reality. . . ."); WHITE, *supra* note 33, at 154–55 (impact of confessions on jurors); Kassir et al., *supra* note 33, at 199–200 (noting that even observers of interrogations of the innocent by guilt-presuming interrogators whom the observers knew were acting under such a presumption, and, therefore, were using more pressure

There is no reason to think that similar dynamics will have any less force at other steps in the process, and these multi-stage dynamics may be reinforcing. Thus a flawed cross-racial identification may lead to a presumption of guilt resulting in aggressive interrogation tactics that elicit a false confession. The identification of sloppy lab work further implicating the defendant is not further pursued or corrected because of the operative presumption of likely guilt. Racial code words are used by prosecutors in closing arguments to draw on images of black ill-characters. A jury skeptical of a seemingly evasive defendant convicts. No other leads or theories have been pursued. Another injustice has been done.³⁶

V. CONCLUSION

So, I know I have proven nothing but my own ignorance and our collective blindness too. That, however, has been one of my two major goals. The other has been to plant the idea that ignorance is not, after all, bliss, and to encourage many of you to pull off the blinders. Perhaps by doing so we'll see that the scales of Lady Justice were well-balanced after all. But I doubt it, for she is usually depicted as white, while the lives in her hands are not. I don't mean to imply that a mistaken conviction of a black man is any worse than one of a white man. But I do worry that just being black makes the mistake all that much more likely in the first place.

to obtain a confession, were still more likely to judge the defensive suspect guilty, despite considering these same suspects' exculpatory explanations "plausible").

³⁶ See, e.g., Sheri Lynn Johnson, *Racial Derogation in Prosecutors' Closing Arguments*, in *DARK FIGURE*, *supra* note 18, at 79, 79–102 (discussing prosecutors' use of racial imagery and code words in closing arguments). See generally BRIAN FORST, *ERRORS OF JUSTICE: NATURE, SOURCE AND REMEDIES* (2004) (cataloguing the risks of error at each stage of the criminal justice system and how they might cumulate).

